

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
3:14-cv-416-FDW  
(3:05-cr-104-FDW-DSC-16)**

**HOWARD EDWARD MCCALL,** )  
 )  
 **Petitioner,** )  
 )  
 vs. ) **ORDER**  
 )  
 **UNITED STATES OF AMERICA,** )  
 )  
 )  
 **Respondent.** )  
 \_\_\_\_\_ )

**THIS MATTER** is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence filed under 28 U.S.C. § 2255. (Doc. No. 1). For the reasons that follow, the Court finds that this is an unauthorized, successive petition, and the Court therefore dismisses the Motion to Vacate.

**I. BACKGROUND**

On December 18, 2007, Petitioner was convicted of conspiracy to possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Crim. No. 3:05-cr-104, Doc. No. 510 at 1-2: Judgment). Petitioner was sentenced to an active term of 240-months' imprisonment. Petitioner appealed, and on November 20, 2009, the Fourth Circuit Court of Appeals affirmed Petitioner's criminal judgment in its entirety. United States v. McCall, 352 F. App'x 811 (4th Cir. 2009) (unpublished). (Id., Doc. No. 685). The Supreme

Court of the United States denied Petitioner's petition for a writ of certiorari on April 4, 2010.

McCall v. United States, 130 S. Ct. 2358 (2010).

On April 5, 2012, Petitioner filed a motion to vacate under Section 2255, seeking relief under the Supreme Court's decision in Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010), and the Fourth Circuit's en banc opinion in United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc). (Civil No. 3:12-cv-792, Doc. No. 1 at 2-5). In an order dated November 30, 2012, this Court denied the motion to vacate. (Id., Doc. No. 2 at 2). On June 10, 2013, the Fourth Circuit dismissed Petitioner's appeal. (Crim. No. 3:05-cr-104, Doc. No. 797). Petitioner placed the instant § 2255 petition in the prison system for mailing on July 22, 2014, and it was stamp-filed in this Court on July 29, 2014. Petitioner again raises a Simmons claim in his § 2255 petition.

## **II. STANDARD OF REVIEW**

Pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings, sentencing courts are directed to promptly examine motions to vacate, along with "any attached exhibits and the record of prior proceedings" in order to determine whether a petitioner is entitled to any relief. After having considered the record in this matter, the Court finds that no response is necessary from the United States. Further, the Court finds that this matter can be resolved without an evidentiary hearing. See Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

## **III. DISCUSSION**

Petitioner filed the instant motion to vacate seeking to have the Court vacate his conviction and sentence in Criminal Case No. 3:05-cr-104-FDW-DSC-16. Petitioner has already filed a

motion to vacate challenging the same conviction and sentence, and the motion to vacate has been denied on the merits. Pursuant to 28 U.S.C. § 2244(b)(3)(A), “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Thus, Petitioner must first obtain an order from the United States Court of Appeals for the Fourth Circuit before this Court will consider any second or successive petition under 28 U.S.C. § 2255. Petitioner has not shown that he has obtained the permission of the United States Court of Appeals for the Fourth Circuit to file a successive petition. See also 28 U.S.C. § 2255(h) (stating that “[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals”). Accordingly, this successive petition must be dismissed. See Burton v. Stewart, 549 U.S. 147, 153 (2007) (holding that failure of petitioner to obtain authorization to file a “second or successive” petition deprived the district court of jurisdiction to consider the second or successive petition “in the first place”).

#### **IV. CONCLUSION**

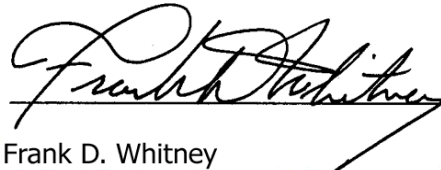
For the foregoing reasons, the Court will dismiss Petitioner’s § 2255 Motion to Vacate for lack of jurisdiction because the motion is a successive petition and Petitioner has not first obtained permission from the Fourth Circuit Court of Appeals to file the motion.

**IT IS, THEREFORE, ORDERED** that

1. Petitioner’s Motion to Vacate, (Doc. No. 1), is **DISMISSED** as a successive petition.
2. **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, this Court declines to issue a

certificate of appealability. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (when relief is denied on procedural grounds, a petitioner must establish both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right). Petitioner has failed to make the required showing.

Signed: July 30, 2014

  
Frank D. Whitney  
Chief United States District Judge

